

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

ERRORS RELIED UPON

1. The Court of Appeals for the Seventh Circuit erred in that it refused to hold that the trial judge erroneously overruled the demurrers to the Indictment filed by the petitioner herein.

2. The Court of Appeals for the Seventh Circuit erred in that it failed to hold that the intervention in this proceeding by the trial judge and the conduct of the proceedings by the trial judge was so prejudicial to the defendant as to deprive him of a fair trial by due process of law and hence constitute reversible error.

II.

JURISDICTION

This court has jurisdiction to review this case under the general power conferred by Judicial Code, Section 240 (28 U.S.C.A. Sec. 347).

This being a criminal case and having been in the United States Circuit Court of Appeals for the Seventh Circuit The power to grant certiorari is conferred upon this court by the above named statute.

III.

SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals for the Seventh Circuit held that the trial judge did not err in overruling the demurrer to the Indictment herein, and that while it did not approve of the conduct of the trial by the trial court that the actions of the trial judge were not so prejudicial as to warrant a reversal inasmuch as the Circuit Court of Appeals concluded that there was sufficient evidence to sustain the verdict.

It is the contention of this petitioner that:

(1) The first ten counts of the Indictment purporting to charge substantive offenses were all defective by reason of ambiguity and by reason of their failure to contain all the elements required for purposes of charging the ^{offenses} ~~offenses~~ intended to be charged or any offense against the United States, and that the sentence imposed could not be imposed under the eleventh count of the Indictment and hence the whole judgment should fall.

(2) The conduct of the trial judge in the examination of witnesses and in the comments made by the trial judge throughout the proceedings were such as to deprive the defendant of the presumption of innocence until the conclusion of the trial and were so prejudicial to his right to a fair and impartial trial as to render the conduct of the trial one in which he was deprived of due process of law.

IV.

ARGUMENT

A statement of the facts germane to the issues raised herein is set forth fully in the Petition for Writ of Certiorari, pages 3 to 5.

1. **Counts I to X inclusive of the Indictment failed to charge an offense as required by due process of law and demurrers thereto should have been sustained.**

It is true that an Indictment is not required to name the statute under which it charges a defendant; but it must allege all the necessary elements of an offense under some statute, and the omission of any fact or circumstance necessary to constitute the offense will be fatal *Harris vs. U. S.*, 104 F. (2d) 41, 45 (CCA8), *U. S. vs. Cruikshank*, 92 U. S. 542. In the case of *U. S. vs. Hess*, 8 S. Ct. 571, the Supreme Court said on page 573,

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

The Supreme Court said further on page 574:

"A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

The Court says further on the same page,

"The essential requirements, indeed all the particulars, constituting the offense of devising a scheme to defraud, are wanting. *Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict.*" (Italics ours.)

The Eighth Circuit Court of Appeals in *Harris vs. U.S.* 104 F. (2d) 41, 45, said that an Indictment

"must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense of which the latter is charged with."

Measured by these standards, Counts IX and X of the Indictment herein are definitely wanting.

The United States Attorney and the trial court could not agree as to what offenses these counts charged. The United States Attorney asserted in the Circuit Court of Appeals that these counts were intended to charge violations of Section 17 of the Securities Act of 1933 (15 U.S.C. 77 q). (See United States Attorney's Brief, page 2, in the Circuit Court of Appeals). The court in his charge to the jury said that these counts charged violations of Section 215 of the Criminal Code (18 U.S.C. 338). (R. 209). Actually neither of the counts properly charges an offense under either of these statutes. Under Section 15 U.S.C. 77 q, a necessary element of the offense is that the "device, scheme, or artifice to defraud" must have been employed in the sale of securities. While Counts IX and X state that the scheme or ~~article~~^{artifice} alleged in Count I was employed in the sale of a security, both counts go further and identify the alleged security referred to as "investment contracts evidenced by certain warranty deeds conveying in fee simple certain lands in Brewster County, coupled with certain collateral, agreements, promises and undertakings hereinbefore alleged and incorporated herein by reference to said first count," and further specify what was mailed under them (Under Count IX, four deeds with recording fees were mailed and under Count X a letter acknowledging a check for \$200 and enclosing a deed, a plat, and a receipt for same to be executed and returned). The mail is the only

means of transportation charged under these counts. Certainly Warranty deeds are neither securities nor are they evidence of investment contracts either by common use of the terms or by the definition contained in the statute (See Sec. 77 b, Title 15 U.S.C.A. for definition of "security" as used in this statute) Warranty deeds are just what they purport to be, i.e., evidence of title to land. They are precisely the opposite of an investment contract; and no other collateral, agreements, promises, and undertakings were incorporated therein by reference and no securities were charged to have been sold. The entire indictment was for the sale of lands not securities.

The element of employment of the devise or scheme in the sale of securities which is the very gravamen of the offense under this statute is entirely lacking in both of these counts, hence neither of them can be sustained as charging an offense under this statute.

The essential elements necessary to be charged under Sec. 215 of the Criminal Code (Title 18, Sec. 338 U.S.C.) are (1) a devising or intending to devise a scheme or artifice to defraud or for obtaining money or property by false pretenses and (2) for the purpose of executing said scheme or attempting to do so, the placing of any letter in any Post Office in the United States. *U. S. vs. Young*, 232 U. S. 155; 34 S. Ct. 303, *U. S. vs. Berg*, 144 F. (2d) 173 (CCA New Jersey).

The "gist" of the offense is the use of the mails for the executing of the scheme, *Brady vs. U. S.*, 24 F. (2d) 405, but both elements are essential *Fournier vs. U. S.*, 58 F. (2d) 3 (CCA 7).

In counts IX and X here it is not charged that the mails were used in execution of a scheme or artifice. In fact the reverse is charged, i.e., that the scheme or artifice was em-

ployed in the use of the mails to sell securities, not that the mails were used in the execution of the scheme or artifice. It follows that the failure to charge the use of the mails "for the purpose of use or execution or attempting so to do" the scheme or artifice vitiates these counts as charges of offenses under Sec. 215.

That this is not a mere quibble can be seen when we apply the rule stated above in *Harris vs. U. S.*, 104 F. (2d) 41, 45, i.e., that the indictment must be "free of ambiguity" and must "leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with."

Certainly, these counts cannot be said to be free from ambiguity, nor can the mind of the defendant be said to be free from doubt when even the distinguished United States Attorney and the learned trial judge could not agree on what offense was charged.

There are two other fatal deficiencies in these counts which apply as well to all counts of the Indictment except count XI, the conspiracy count. They are as follows:

(a) Nowhere in any of the Counts I to X, inclusive, is there any charge as to when the scheme or artifice was devised. The only dates charged are dates of mailing. In order for the mailing to have been in execution, or attempted execution of the scheme or artifice, it (the scheme or artifice) must have been devised before and existed at the time of the mailings, yet for all these counts charge, the scheme or artifice may have been devised after the mailings took place. The only place a date is charged other than the mailing date is in Count XI, but this count is not incorporated by reference in any other count and hence cannot sustain a general verdict. It was essential to charge the time, at least some time before the date of mailing and as

was pointed out above this is a matter of substance and cannot be established by intendment or implication or inference or by way of recital. *U. S. vs. Hess*, 8 S. Ct. 571, 573. Hence it follows that all of counts I to X inclusive are defective in an essential element and therefore the demurrer should have been sustained for all of these counts for this reason.

(b) If we assume the alleged scheme or artifice to have been devised before the mailings, and this is not charged anywhere in Counts I to X, then the "count letters" must constitute mailings before the consummation of the scheme or artifice. *Kann vs. U. S.*, 323 U.S. 88. Here the letters charged in Counts II, III, V, VII, and IX transmit deeds to the recorder for recording and nothing more. If any inference is to be drawn it is that the transactions with the parties to whom the deeds were given had been completed and whatever consideration was to be given had already irrevocably passed or the deeds would not have been given. (There is no charge that mortgages were accepted or credit extended). The recording of deeds was not necessary to pass title under the laws of Texas. *Davis vs. Bond*, 141 S. W. (2d) 979; *Urban vs. Bagley*, 291 S. W. 537. The letter in Count I merely reports to a purchaser that the deed has been sent for recording, and that in Count V transmits a recorded deed to the purchasers. Count VIII alleges a letter that merely answers a question relative to an increased government appropriation and promises a visit. There is no charge that there was a misrepresentation as to this appropriation or that the party to whom the letter was addressed was solicited or bought after this letter and the letter is in no wise a solicitation. Count X acknowledges receipt of a payment and transmits a recorded deed. All these counts show on the face of them that the transaction

is complete and that the payment has already been received, otherwise the deeds would not have been issued. Count VI which is the nearest to a proper charge in this respect of any acknowledges receipt of a payment and states the balance of the account. It makes no solicitation. Certainly, none of the counts other than Count VI could be fairly said to charge a use of the mails in furtherance of any scheme or artifice, or in the execution or attempted execution thereof, the transaction having been completed before the mailing in every instance and we submit that the letter in Count VI is not sufficient. No charge is made that these letters were sent to lull the purchasers into a sense of security, nor do the letters set out even lend themselves to such inferences. See also *Stewart vs. U. S.*, 119 F. 89, 95, and *McLendon vs. U. S.*, 2 F. (2d) 661.

Where some counts in an Indictment are invalid a judgment on a general verdict wherein the punishment exceeds that proper under the good counts will not stand.

We have shown above that Counts I to X inclusive, are all bad. Count XI charged conspiracy under Section 88, Title 18 U.S.C.A. Under this statute the maximum sentence that could be imposed is two years and a fine of \$1,000. Here the court imposed a sentence of five years and a fine of \$1,000. This judgment could be sustained only under one of the Counts I to X inclusive, hence the judgment should be reversed. *Verna vs. U. S.*, 54 F. (2) 919 (CCA 7).

2. The participation of the trial judge in the trial was of such nature that it deprived the petitioner of a fair and impartial trial according to due process of law hence constituted reversible error.

It is the duty of the trial judge to both appear and be fair and impartial throughout the Trial. *Bollenbach vs. U. S.*, 66 S. Ct. 402, *Adler vs. U. S.*, 182 F. 464, 472; *U. S. vs.*

Marzano, 149 F. (2d) 923; *Quercia vs. U. S.*, 289 U.S. 466, 471; *Malinsky vs. People*, 324 U. S. 401.

However good may have been the motives of the trial judge in this case, the record shows he permitted himself to lapse into the role of advocacy and became fired with the zeal of the prosecutor. The defendant was entitled to the presumption of innocence, not merely until the trial began but until all the evidence was concluded. This presumption is not preserved to him if long before the conclusion the judge by his remarks displays a conviction of his guilt. We will examine here some of the questions and observations of the court during the course of the trial. In order to keep this brief within limits we refrain from discussing all of them.

With the First Witness (R. 38) the court intervenes to lead the witness relative to a map.

The Court: "What he wants to know showing oil wells on it?"

On the same page where the defense counsel was proposing to cross-examine a government witness "About something that is in the book" the court remarked "Maybe you better not cross examine." This could infer to the jury only that the defendant should not have the right to cross-examine or if he did he would likely develop testimony unfavorable to him. A witness, a former employee of the defendant, testified that he had assisted in coloring a map from information given him by the defendants. The Court interposed "Was it colored from prospectus received from them?" (R. 39) a proper question for a prosecutor, hardly called for by the judge.

On the same page where a witness had testified that he did not mark places on the map where there was thought

to be oil, the court interposed "It was colored to show where some other company might have had a lease."

Another government witness had already testified 46 wells shown on a map of the area he had made were all dry. The judge interposed "You say they were all dry?" (R. 40) This required a repetition and emphasis.

When a defense counsel tried to cross-examine a government witness as to ranch land in the vicinity of the land sold, the court stopped him with the comment that he had knowledge of good and worthless land within a distance of 5 miles in southern Indiana and within 10 miles in Arkansas (R. 50). With the government witness C. C. Bitler, the judge interrupted the direct examination, took over the witness and by questioning him induced him to say that he had returned his deeds to the defendant in exchange for an interest in an oil well in Illinois and that he did not deed the land back. (R. 59-60).

On cross examination of the government witness Provice, the witness testified to having a map shown him by the petitioner herein. The trial judge offered his own comment, adding to the testimony, "And following that he received the Clippings." (R. 69).

Where a witness was being cross-examined the court volunteered the information that the Glass mountains are in California. (R. 83). We do not find him supported elsewhere in the record.

On direct examination of the government witness Brocking the Court interrupted and took over a large portion of the examination developing the government's case in the manner appropriate to a prosecutor (R. 86, 87), he also participated in the cross-examination (R. 88). When the Witness testified that he had bought two tracts of forty

acres for \$10 per acre, lest the jury miss the total paid, the court stated his computation of the payment, \$800.00. (R. 86).

The court also participated in the redirect examination of the next government witness Kraft (R. 90), and in the direct examination of the government witness Siesdorfer (R. 91, 92, 93) and in the cross-examination of this witness (R. 93). The court, not satisfied with the prosecutor's inquiry as to how the witness received certain exhibits, interrupted to lead the witness saying to him "Whether it was through the mail, or not, is what he means."

The court participated extensively in both the direct and cross-examination of the government witness Bracken (R. 99-108). He inquired whether the defendant Schneider was related to "the Snyder in Columbus." (R. 99). Whether the Snyder in Columbus was a person of low repute or not is not disclosed, but the jury may have known.

Through his questioning of this witness, the court brought out that the brother of the defendant (petitioner here) had sold the witness an interest in some oil lease in Kentucky while having lunch together and that the witness had paid \$1,000 to the brother. (These transactions were not charged in the indictment nor was the brother a party). The court closed this phase of the questioning by commenting that defendant's brother had paid for the dinner, all of which was prejudicial to the defendant. (R. 102). The court also brought out that this oil lease was not signed by a notary. (R. 103). This was a transaction having nothing to do with this case but could be calculated to indicate to the jury that there was evil purport in this lease not being notarized. The court here again brought out that deeds had been returned to the seller and no conveyance by the witness where he exchanged Texas land for an in-

terest in an oil well in Illinois (R. 104). Immediately afterward on cross-examination, the witness evidently being shown a deed admitted that he had made a conveyance back (R. 105). The judge commented to this witness "Doctor, you aren't much of a business man."

The attitude of the court is displayed in a question at the top of page 108 in the record where the witness had just testified that the salesman told him about the sale of an 80 acre tract near Dallas or Houston for \$1,000,000. The court inquired "Do you know how far Dallas or Houston is from you?" When the witness answered that he did, the court dropped the subject indicating that his purpose was not to bring out the fact of the distance but was an unsuccessful attempt to show that the agent had deceived the witness, purely a prosecutor's tactics.

The court participated in direct examination of the witness Goff (R. 108-109) and that of witness Lambert (R. 110-111) inquiring whether the salesman, Harry White, was "one of the Whites" at Muncie, what the court or the jury may have known about the Whites in Muncie is not disclosed.

When the witness Marley testified that the defendant Earnhardt had showed him the picture of a landscaped home in Texas that belonged to him, the court inquired whether it was "a nice home." (R. 112). When this witness enumerated the sums he had paid, the court inquired "That was in addition to the paint?" (R. 113).

The witness Carl L. Rost had testified to purchases aggregating 840 acres at \$10 per acre. The court not satisfied did the mathematics for the jury and brought out that the amount paid was \$8,400.00 (R. 118). He repeated the same process with the witness Bruce (R. 122) attempting to bring out that the witness had paid in \$4,300 but the witness said he had traded in some stock.

The court participated in the direct and cross-examination of the government witness Della B. Jenkins (R. 125-129, 130-132). (Part of the testimony of this witness shown on pages 130-132 of the record is erroneously under the page heading of Maurice L. Jones). He permitted this witness to read from a memorandum written by her sister (R. 128) but refused to admit it in the record (R. 129). He also participated in the examination of witness Maurice L. Jones (R. 129-130, 131-132) and questioned a former employee of the defendant in detail (R. 133-134).

To a witness testifying that the southern part of the county was rough, mountainous, badly eroded, the court commented "Desert Land." (R. 135)

The government witness J. W. Frazier, Clerk of Brewster County, Texas, whose examination the court participated in was questioned about a prospectus of the Alpine Chamber of Commerce which defendant relied upon, and of which body the witness was a director. The court queried, obviously with sarcasm, "Is it very hard to get a letter from the Chamber of Commerce about anything?"

When the defendant Earnhardt (petitioner here) came to testify the court participated in the direct examination at length and demonstrated ability as a cross-examiner as well as wit and sarcasm (R. 147-167). The Court stressing the examination with respect to a certain picture commented "I understand and the cattle were corralled for the taking of the picture?"

The witness: "I don't know. Not for myself."

The Court: "For the purpose of your displaying to your prospective purchasers?"

The witness: "No, I didn't."

The Court: "What—Why was it made?" (R. 147).

And again referring to the picture, "You used them in your business?" and again "You had them?" and again "What did you get them for?" (R. 148)

On the same page, the court questions the witness about not keeping the land for himself.

On page 149 of the record, the court questioned the defendant about a transaction he engaged in, drilling a well not involved here.

The Court queried: "You were at the well?"

Answer: "Yes."

The Court: "You know it came in dry?"

Answer: "Yes, sir."

The Court: "You told them that?" (R. 149)

At another place he queried the defendant: "Did it strike you that only six thousand people lived in that County when it was so rich?" (R. 151).

The defendant testified that the land in Texas was frontier land. The court queried: "Did you tell these purchasers that?"

Answer: "Yes, sir."

The Court: "Why didn't you sell it down there to people who knew about it?" (R. 152).

And again on the same page, the court said: "Did you expect a man who bought ten acres to use it for grazing?" and on page 153, the court queried: "Have any rattlers down there?"

Answer: "Plenty of them down there, your Honor."

The Court: "Eat them down there—rattlesnake steak?"

Answer: "Yes."

The Court: "Did you tell that to these people when you sold this land?" (R. 153) and again in querying the defend-

ant, the court said: "No publication told how many dry holes down there?"

Answer: "Yes."

The Court: "Did you show that to these people before you sold them?"

Answer: "We told it to them."

The Court: "Told them it was all dry?"

The witness answered that he had. (R. 154). The Court queried the defendant on page 155 of the record about the drilling of a well in Texas not involved in the charges here. The defendant testified that he had sold the land for \$10.00 an acre. The court commented: "That was all it was worth?" and again "You didn't pay that much for it." (R. 156). The defendant testified that he had paid a commission of \$4.00 an acre for selling the land. The court commented: "More than it cost you?" to which the defendant replied referring to the salesman: "They didn't make a living at that."

The court commented "These poor people you sold it to didn't make a living. These two women are living in a Home in Louisville." And again the Court: "How much money in securities was it you took from these women?" (R. 156). Obviously, the form of the question implied some bad method of taking and the comment that the two women were living in a Home in Louisville was obviously intended to convey the idea that they were pauperized, whereas in fact the testimony was that these women were living in a Home maintained by the Episcopal Church where they were paying board (R. 130).

The Court inquired of the defendant how he got the names of these women and not satisfied with the answer remarked, "Isn't it a fact that you have lists of who to get—people to buy on these. Didn't you have that list?"

Defendant denied having seen such list, except on stocks.

The Court commented: "You can get those lists out of New York" and then queried, "What is it you call them?"

Answer: "Mailing lists."

The Court: "No, it isn't that. Isn't that what you call the 'Sucker List'?"

The Reporter inquired as to what that was and the court directed him to leave that out, but he did not instruct the jury to disregard it. (R. 157). The Court repeatedly tried to make this defendant admit that he worked with the defendant Schneider in selling. (R. 160-161). He insinuated that the defendant was interested in the Big Bend Abstract Company. (R. 161). He subjected the defendant to a very grilling cross-examination (R. 162-163) typical of which is as follows:

The Court: "He wired you he believed land values in that vicinity will increase many times within the next sixty days?"

Answer: "Yes, sir."

The Court: "Did you believe it?"

Answer: "I had no reason to doubt it."

The Court: "Did you believe that?"

Answer: "Certainly, I had no reason not to."

The Court: "How long did you deal in Texas lands?"

Answer: "Possibly twenty-five years."

The Court: "You believed land values in the next sixty days would increase many times in Brewster County?"

And further the court commented "You are a pretty good salesman, aren't you?" (R. 162) and again on page 163, the court said "Well, do you want the Court and Jury to think when you went to see a customer that you, for the most

part, just showed them these books and newspaper articles, made no comments?" and again the Court "You know a lot of that stuff the Alpine Chamber of Commerce put out and the other Alpine newspapers, you knew a lot of that stuff was unfounded?"

Answer: "Nothing the Chamber of Commerce—"

The Court interrupted: "Will you answer?"

Answer: "No, I did not."

The Court: "You suspected?"

Answer: "No, sir. Not with the man at the head."

And further the court: "Why did you continue to sell if you thought it was going to increase?" (R. 163).

The Court further grilled the defendant about the sale of property for another party and about the Abstract Company leaving out certificates as to liens, (R. 165) and another grilling cross-examination appears at top of page 166 of the record. At the top of page 167, the Court referring to certain pictures stated: "As I understand, you bought them and displayed them to some of these prospective purchasers?"

The witness denied use of the pictures.

Court: "I understand you displayed them." The court apparently inferring to the jury that he had positive knowledge of this fact, (R. 167) and on the same page the court stated: "Who was the lady that got Two Dollars?"

Answer: "One of these purchasers was."

The Court: "Did they take one of these purchasers?"

Several witnesses were offered in defense and the court intervened in the examination of most of these witnesses (R. 170-189). The Court cross-examined in all of these instances. One witness on page 186 of the record (Eugene E

Sims) testified that he had bought land where wells were within fifty feet where he got no oil.

The Court asked: "Did you put down a well in Brewster County fifty feet?"

Answer: "No, over in Illinois."

The Court: "That close? Where was that?"

Another witness on page 189 was referring to the salesman, Schneider, the Court: "Did he tell you how many acres it would take to keep one cow?"

The Court likewise participated to some extent in the direct examination and in cross-examination at length of the defendant, Schneider, (R. 181-204) and also questioned character defense witnesses offered by Schneider. Defendant Schneider had testified that he had bought some of this land himself which he was holding and had had friends invest in it, and that he expected to realize something on it. The court commented: "How about eighty-one years of age?" (R. 197). Schneider also testified that he did not know the distance of the Tampeco oil field from Brewster County land, that he did not speak about distances to prospective purchasers. He showed them all the maps. The Court commented: "If it was as close as the Kansas field?" (R. 198).

The Court cross-examined witness on pages 198 and 200 of the record.

Another witness, John Vondebeck on page 205, said he selected land from a map. The Court said: "Did you see any little red derricks?"

Answer: "No, sir."

The Court: "Or any little nob's?"

Answer: "No, sir, just a section of land where I was going to buy."

The Court: "No location of oil wells?" and on page 206, "Did he say anything to you about other doctors investing in this land?" On page 207 of the record the court questioned the witness Vondebeck about a purchase made from another company, not related to this case at all.

The Court in its charge to the jury evidently recognized that he had gone too far and attempted to remove the cause from his conduct by instructing the jury that if "you may have gained the impression that the court has an opinion as to either the guilt or the innocence of these defendants, or either of them, you and each of you are admonished to not permit such statement, or statements upon the part of the court to in any way enter into your consideration of the case." (R. 208). The court had made no comment up to this time other than his participation in the conduct of the trial, which we have complained of, hence, that must have been what he was referring to. The instruction to the jury was not objected to, and hence perhaps not in issue. However, it is to be noted that the court in his charge (R. 224) directed the jury to consider among other things whether the customer "could afford or not afford to lose money thus invested." We submit that this was misleading to say the least and that if there was a fraudulent scheme and the mails were used for its furtherance, it did not rest upon the financial status of the people who participated as customers.

To completely analyze the participation of the court in this trial would extend this brief beyond all reasonable bounds. We have merely analyzed some of the outstanding examples and we bespeak of the court a consideration of

the record which shows that the court intervened and questioned witnesses to the extent of approximately 340 questions. The uncertainty in number depending on whether some instances be characterized as questions or statements of the court. This exceeded $\frac{1}{3}$ of the questioning shown by the record on the part of all parties. In almost every instance the court's questioning is gratuitous and substantially all of the questions are worded to develop testimony for the prosecution. No where does the court appear to be attempting to bring out evidence favorable to the defendants. This situation is not a result of any failure on the part of the United States Attorney, who prosecuted the case, and it was so found by the Circuit Court of Appeals in its opinion. We submit that if it becomes necessary for the court to interrogate witnesses, such questioning should be impartial. However in this case the activity of the court was that purely of the prosecutor except that he took the liberty of his position to ask questions on direct examination which would have been objectionable as leading questions or as cross examination, had they been posed by the prosecutor.

As was said by this court in *Starr vs. United States*, 153 U. S. 614, 14 St. Ct. 919-923,

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. Citing *Hicks vs. U. S.*, 150 U. S. 442.

The error of the Circuit Court of Appeals in this case, we think, does not lie in its failure to recognize that the trial judge had stepped beyond his bounds, but in erroneously concluding that if evidence could be found in the record sufficient to sustain the verdict that the improper

participation of the trial court was not reversible error or in other words that the error was cured by the verdict. This, we submit, is an erroneous construction of the rule. As this Court well said in *Bollenbach vs. United States*, 66 S. Ct. 402, 406.

"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.* * * In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

See also *Weiler vs. United States*, 65 S. Ct. 548, 551.

We submit that in the light of these cases, an examination of the record discloses that, whatever may have been the good intention of the trial judge, his participation in this case was such as to leave no doubt in the minds of the jury that he favored a conviction of this petitioner long before the case was submitted to the jury, in fact from early in the trial, and under such circumstances it cannot be said that the judge was presiding impartially and without bias, and as was said in the case of *Bollenbach vs. United States*, 66 S. Ct. 402, 405, cited above. "The error is not cured by a prior unexceptional and unilluminating abstract charge."

We have made no comment as to the guilt or innocence of this petitioner for the issue is not whether he was guilty or innocent, but whether he was adjudged guilty by a jury under appropriate judicial guidance and by due process

of law; and measured by this test, we submit that the judgment herein cannot properly stand. Nevertheless we submit that if it were the issue, substantial doubt is raised on this record as to whether a conviction could be sustained on the evidence. We have considered, however, that that question is not of any importance since the defendant did not have a trial by due process of law.

CONCLUSION

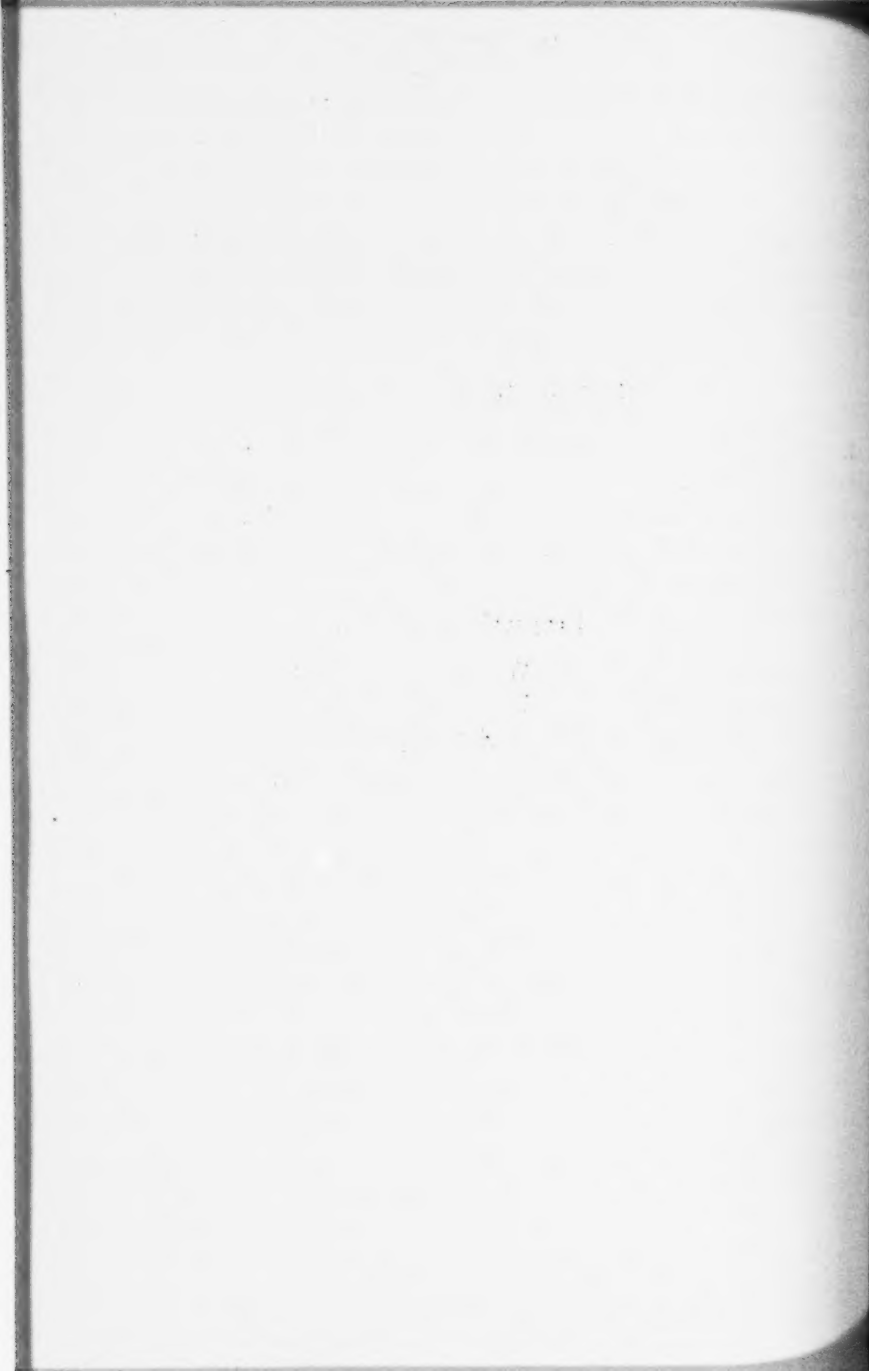
In view of the foregoing authorities and conclusions apparent from the record, which we have herein set forth, we conclude that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this cause should be reversed.

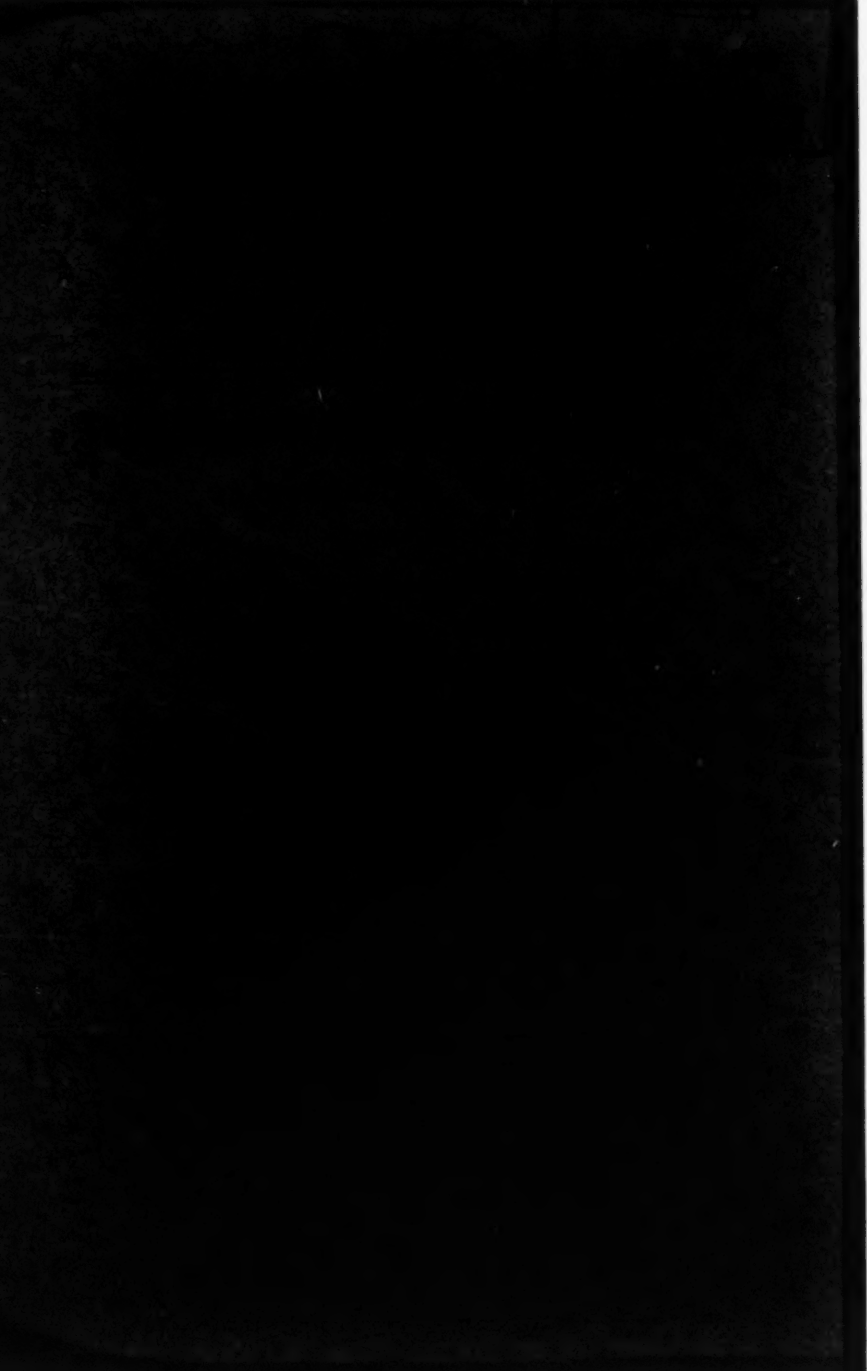
Respectfully submitted,

WALTER E. WILES and

WALTER W. DUFT,

Attorneys for Petitioner.





In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1158

GEORGE A. EARNHARDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the circuit court of appeals affirming petitioner's conviction was entered on February 19, 1946 (R. 249). A petition for rehearing was denied on March 26, 1946 (R. 250). Hence, the action of the circuit court of appeals which marked the beginning of the time for filing a petition for a writ of certiorari (see *Gypsy Oil Co. v. Escoe*, 275 U. S. 498; *Morse v. United States*, 270 U. S. 151, 153-154) occurred after the effective date (March 21, 1946) of the new Federal Rules of Criminal Procedure. The petition for a writ of certiorari was not filed until April

(1)

26, 1946, more than thirty calendar days after the entry of the order of the circuit court of appeals denying a rehearing. The petition is, therefore, out of time under Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure (see also Rule 59) and should be denied for want of jurisdiction.

Respectfully submitted.

J. HOWARD McGRATH,
Solicitor General.

MAY 1946.

